

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 66 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

RAJNIBEN BHAGAT

Versus

STATE OF GUJARAT

Appearance:

MR GM AMIN for Petitioner
Mr K P Raval, APP for Respondent No. 1
SERVED for Respondent No. 2
MR AS KOTHARI for Respondent No. 3, 4

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 25/02/97

ORAL JUDGEMENT

This Criminal Revision Application under section 397 of the Code of Criminal Procedure is directed against the judgment and order dated 30.1.1996 passed by the learned Executive Magistrate, Court No.2, Metropolitan Area, Ahmedabad in M.Case No.8/95.

2. The undisputed facts are that there is a bungalow being Bungalow No.43 situated at survey No. 150 of Shahibaug Contonment Area which was leased out to one K U Kavishwar and J U Kavishawar in the year 1932 by the Ministry of Defence. It was let out by the said Kavishawar to M/s.Bombay Garage Ltd. for a period of 5 years by agreement dated 1.5.1988. On expiry of the term in the year 1988 the said agreement was not renewed. On 6.10.1995, one Rajbahadur A Pathan, watchman of Bungalow No.43 under the control of Bombay Garage filed a FIR at police station Shahibaug stating that some persons of the opposite parties entered into the compound at 11.00 p.m. and broke open the grill and threatened to kill him and they removed the locks of the bungalow and put their locks. On this, the police registered a case being C.R. No.255/95 for offence under sections 395, 148, 452 and 427 of I.P.C. and proceeded with the investigation. The police submitted report on 16.10.1995 before the Executive Magistrate stating that since the value of the disputed property is very high, there is apprehension of breach of peace. It was thus prayed that appropriate proceedings be taken for attachment of the property. In view of this the learned Executive Magistrate drew an order under section 145(1) of the Cr.P.C. and also passed an order under section 146 of the Cr.P.C. for attachment of the bungalow in question. Opponents No.1 and 2 namely; Kirtibhai U Kavishwar and Jatinbhai U Kavishawar submitted written replies stating that there was dispute among the brothers with respect to the partition of the property and in this connection, they had instituted civil suit in which the court had appointed a Receiver namely; Advocate Shri P V Pandit. It was also stated that the premises was let out to opponent No.3 namely; Rajniben Bhagat for a period of five years and on expiry of the period of lease in the year 1988, the opponent No.3 had handed over the possession of the disputed property to them. Thereafter they executed Banakhat with Yunusbhai with respect to the disputed property on 6.10.1995, who had gone to the Bungalow for removing the hedges and placing new hedges in place of it. However, allegations of quarrel and forcible possession were denied. Mr Kirtibhai Umiyashankar also filed an affidavit on 12.12.1995 and stated that they are in actual possession of the Bungalow from the date of appointment of the Receiver.

3. The learned Executive Magistrate, considering the police report, written replies and the documents produced before him arrived at the conclusion that there was reason to believe that possession of the disputed

property was not with opponent No.3 (present petitioner) and the possession of the property was taken over by opponents No.1 and 2. In arriving at the said conclusion, the learned Magistrate relied upon the fact that the period of lease expired in the year 1988. The learned Magistrate also relied upon the statement that all payments of property tax, electricity bills etc. were made in the name opponents No.1 and 2. In view of the finding, the learned Magistrate, by the impugned order dated 30.1.1996, revoked the order of attachment and further ordered to hand over possession to opponent No.1. The Police Sub Inspector, Shahibaug was directed to initiate necessary proceedings in this regard and to ensure that both the parties do not disturb the peace with respect to the disputed property.

4. Challenging the order dated 30.1.1996, Mr G M Amin, the learned Advocate submits that the findings arrived at by the learned Magistrate is illegal and erroneous. It is submitted that the learned Magistrate has held that opponents No.1 and 2 are in possession of the Bungalow only on the basis that the period of lease expired in the year 1988. On the other hand, Mr A S Kothari, learned Advocate appearing for the non-applicant has supported the findings of the learned Magistrate. However, Mr Kothari has not been able to answer a pointed query put to him as to at what point of time, opponents No.1 and 2 entered in the disputed premises. He has, however, invited my attention to the panchnama to show that on 19.10.1995, the petitioner was not in possession. It is also submitted that during the pendency of the civil proceedings, a Receiver was appointed and at that time, possession was delivered by the opponent No.3. So far as the panchname dated 19.10.95 is concerned, the specific case of the opponent No.3 is that on 6.10.1995 one Yunusbhai with some other persons had entered in the disputed premises for removing the hedges and erecting the new hedges in its place and in that regard report was lodged by Watachman, Raj Bahadur Pathan.. In this context, reference may be made to sub-section 4 of section 145 which provides that if it appears to the Magistrate that a person has been forcibly and wrongfully dispossessed within two months, from the date on which the report of the police or other information was received by the Magistrate, such a person shall be treated to be in possession on the date of drawing of preliminary order under section 145(1). Section 145(4) reads as follows:

"145(4). The Magistrate shall then without reference to the merits or the claims of any of

the parties to a right to possess the subject of dispute pursue the statement so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and if possible decide, whether any and which of the parties was, at the date of the order made by him under sub-section (1), to possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if the party had been in possession on the date of his order under sub-section (1)."

In the present case even if the panchnama dated 19.10.1995 is taken to be true i.e. to say that opponent No.3 was not in possession. What is required to be considered is whether she was forcibly and wrongfully dispossessed on 6.10.1995 as alleged in the complaint filed by the watchman Raj Bahadur, if the answer is in affirmative she will be deemed to be in possession on the date of drawing of preliminary order under section 145(1).

5. It is the own case of the opponent No.1 and 2 Kavishwar brothers that there was dispute between them with respect to the subject property which led to filing of civil suit for partition in the court of City Civil Judge (S.D.) Mirzapur, which was registered as Regular Civil Suit No.729/81. By order of the Court dated 17.10.1989, a Receiver was appointed. During the pendency of the said suit, Misc. Application No.103/88 was filed by opponent No.3 before the learned Civil Judge for fixation of rent wherein it was also prayed that she should not be evicted from the premises without due process of law. Mr Y B Pandit, Advocate who was appointed as Receiver, filed reply to the said application in which he has stated that opponent No.3 was in possession of the disputed Bungalow. Para 10 from the reply is extracted as follows:

"10. The agreed rent was Rs.2,000/- per month but according to term No.8 the expenses for necessary repairs work out to Rs.50,000/-. And

according to term No.2 Rs.1,500/- was to be adjusted towards the said repairs cost and Rs.500/- to be paid to the landlord towards monthly rent. Thus, an agreement itself make it clear that the agreed rent was Rs.2,000/- and not Rs.500/- moreover, according to term No.2 of the agreement, the term of agreement was for five years, i.e. upto 30.4.88, and in case tenant intends to exercise an option to renew an agreement for further period of five years, the monthly rent will be Rs.2,300/- per month. In the present position the term of the agreement has already been over on 30.4.1988. But the tenant still enjoying the tenancy, meaning thereby, the tenant has exercised an option, and therefore, tenant should be liable to pay monthly rent of Rs.2,300/-. The agreed rent is the standard rent."

A reading of para 10 clearly shows that opponent No.3 was in possession after the expiry of the lease period. There is another document dated 23.4.1994 written by opponents No.1 and 2 to opponent No.3 demanding rent for different periods from 1.9.83 to 30.4.1994. The amount has been calculated as per the agreement. The agreement has also been placed on record. Para 1 of the agreement shows that the premises was leased out for a period of 5 years i.e. upto 30.4.1988. clause (ii) provides that on expiry of the lease, if the tenant exercises option to renew the contract further, monthly rent will be Rs.2,300/- per month. If either the tenant or the landlord do not desire to renew the contract agreement, 3 months notice on either side will have to be served. The learned Advocate for the petitioner invited my attention to para 5 wherein it is stated that the landlord received a sum of Rs.40,000/- from the tenant free of interest as deposit refundable to the tenant as and when she hands over the vacant possession of the premises. It is not the case of the opponent No.1 and 2 that they have refunded the amount of Rs.40,000/-. It is also not the case of opponents No.1 and 2 that they had at any stage given notice to opponent No.3. On the contrary they have received rent as is evident from a communication dated 23.4.1994. The petitioner has also placed on record a communication dated 19.10.1995 from Defence Estate Officer addressed to Rajniben Bhagat. It speaks that as per the report of her office staff, Rajniben Bhagat was in continued in possession. Another letter dated 4.1.1993 from Mr J U Kavishwar also states that Rajniben i.e. M/s. Bombay Garage whom the premises was given on sub-lease has been in continued possession since 1983.

Rajniben Bhagat in her statement has stated that from 1983 to 1992-93 she has paid all types of taxes pertaining to the subject Bungalow. Payment of tax has been considered in favour of opponents No.1 and 2 by the learned Executive Magistrate. Learned Magistrate failed to consider that even if the tenant deposits amount of taxes that will obviously in the name of the landlord. So far as the incident of 6.10.1995 is concerned, Rajniben in her statement has stated that on 27.9.1995 Yunusbhai has threatened her to vacate the premises. Allegations of threat has also been confirmed by P.S.I. Mr Rana. It is alleged that a Banakhat was executed between Opponents No.1 and 2 and Yunusbhai on 12.9.95. The Civil suit alleged to have been settled on 17.9.1995. It appears that since the opponents No.1 and 2 were not in possession and they were also staying at Baroda, some strategy was adopted to get the premises vacated with the help of Yunusbhai. There is nothing to show that on 6.10.11995, Yunusbhai came in possession. With respect to the incident of 6.10.1995, a complaint was filed by Rajbahadur Pathan who is said to be a watchman in Indian Electro Chemicals. It may be stated that opponent No.3-Rajniben is the Managing Director of Indian Electro Chemicals. Even if it is assumed that the opponents No.1 and 2 got the possession on 6.10.1995 with the help of Yunusbhai, it will only be a wrongful possession.

6. Considering the evidence referred to above, in my view, there is prima facie evidence to show that opponent No.3 was in possession of the property in dispute i.e. Bungalow No.43 situated at Shahibaaug on 6.10.1995 as well as on 17.10.1995, the date on which preliminary order under section 145(1) was passed. My attention has also been invited to the fact that on 2.2.1996, the petitioner applied for stay. By order dated 30.1.1996, the same was refused on the ground that the possession has already been delivered. Thus, inspite of the fact that this court on 8.3.1996, granted interim relief in terms of para 10(B), possession is still with the opponent No.1 and 2. What causes me considerable distress is the circumstances in which the possession was taken by opponents No.1 and 2 just after the learned Executive Magistrate passed the order on 30.1.1996.

7. In view of the aforesaid, this Criminal Revision Application is allowed and the order passed by the Executive Magistrate, Metropolitan area, Court No.2 dated 30.1.1996 passed in M.Case No.8/95 is quashed and set aside. The Police Sub Inspector, Shahibaug is directed to ensure that the possession is restores to the

petitioner-Rajniben M Bhagat within a period of one month. She will continue in possession till she is asked to vacate the premises by due process of law. Rule made absolute to the aforesaid extent.

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